SINGAPORE REPORTS

MUI Bank Bhd v Alkner Investments Pte Ltd

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 685 OF 1989
CHAO HICK TIN JC
5 SEPTEMBER 1990

Land Law — Mortgage — Possession of mortgaged property — Allegations of fraud, illegality or unconscionable conduct on the part of mortgagee — Discretion of court to refuse grant of relief of possession — Opportunity to be given to mortgagor to pay off mortgage — Efforts to obtain alternative financing not to be frustrated

Civil Procedure — Affidavit evidence — Whether allegations hearsay — Application for final and not interlocutory order — Plaintiffs taken to have waived requirement of strict proof — Rules of the Supreme Court 1970, O 41 r 5(2)

This was a mortgage proceeding wherein the plaintiffs, a bank, claimed against the defendants a sum being the outstanding overdraft secured under a legal mortgage, and also delivery of the property mortgaged under that legal mortgage. The senior assistant registrar refused to grant the plaintiffs' claim, and this was appealed against. The defendants' defence rested on fraud, illegality, breach of statutory duty and unconscionable conduct. They claimed that the plaintiffs' officer had improperly put pressure on the defendants' director to undertake a certain transaction and when the director refused to undertake this, relations between the two parties deteriorated. In addition, it was alleged that the plaintiffs' officer had also disclosed information about the defendants to another bank, in breach of the duty of banking secrecy. As a result, the defendants were not able to obtain alternative financing.

Held, dismissing the appeal:

(1) Where the mortgagee's right of entry onto the mortgaged property arises only on default of payment on demand, a reasonable time must be given for the mortgagor to comply with the demand before the right is exercised. There must be an obligation on the part of the mortgagee not to do anything during that period which would delay, undermine or frustrate the mortgagor's efforts to obtain alternative financing.

(2) In this case, if the defendants' allegations of breach of confidence and statutory duty were true, it would be clearly inequitable for possession to be granted to the plaintiffs to enable them to sell the property. It would be justifiable to grant a reasonable period of time to enable the defendants to make alternative arrangements to pay off the plaintiffs. In the circumstances, equity should step in to mitigate the rigours of the law. An early trial was also ordered.

Cases referred to

1 *Samuel Keller (Holdings) Pte Ltd & Anor* v *Martins Bank* [1970] 3 All ER 950 (distd)
2 *Mobil Oil Co Ltd* v *Rawlinson* (1982) 126 SJ 15 (distd)
3 *Birmingham Citizens' Permanent Building Society* v *Caunt* [1962] Ch 883 (refd)
4 *Royal Trust Co of Canada* v *Markham* [1975] 3 All ER 433 (refd)
5 *Quennell* v *Maltby* [1979] 1 All ER 568 (refd)
6 *Rossage* v *Rossage* [1960] 1 All ER 600 (folld)
7 *Gilbert* v *Endean* (1878) 9 Ch D 259 (folld)
8 *Nationwide Building Society* v *Bateman* [1978] 1 All ER 999 (folld)

Legislation referred to

Rules of the Supreme Court 1970 O 41 r 5(1), (2), 83

Gourdeep Singh for the plaintiffs.
Tang Khin Wai for the defendants.

Cur Adv Vult

Chao Hick Tin JC: This is a mortgagee proceeding under O 83 of the Rules of the Supreme Court 1970 ('RSC') wherein the plaintiffs claim against the defendants for a sum of $1,829,610.36 being the outstanding overdraft secured under a legal mortgage, plus additional accrued interest from 1 July 1989. The plaintiffs also ask for delivery by the defendants of the mortgaged properties with vacant possession.

The matter came up before me by way of an appeal by the plaintiffs against a decision of the senior assistant registrar who refused to grant the orders prayed for in this originating summons. Instead, the senior assistant registrar ordered that the originating summons be converted into a writ and the action to go for trial with the affidavits to stand as pleadings. I dismissed the appeal but ordered early trial and costs in the cause. I now give my reasons.

The plaintiffs are a bank. By an agreement of 1 December 1987, the defendants were granted overdraft facilities of up to $1.8m on a current account operated by the defendants with the plaintiffs. As security for the facilities, a legal mortgage of certain properties was executed by the defendants in favour of the plaintiffs. Under the terms of the mortgage, the defendants were required 'to pay to the mortgagee on demand in writing made to the mortgagor the balance which at the date of such demand shall be owing or remaining unpaid ... on the said account ... together with interest ...'.

On 29 March 1989, Tan Lee & Partners, writing on behalf of the plaintiffs, demanded from the defendants the payment within seven days of $1,819,614.21 being the amount overdrawn on the account, plus interest. Notice was also given that if the sum, plus interest, was not paid, the plaintiffs would enforce their rights against the mortgaged properties.

On 21 April 1989, the plaintiffs, through their solicitors, gave notice and demanded that the defendants quit and deliver up the properties with vacant possession to the plaintiffs by 31 May 1989.

In an affidavit filed on 20 September 1989 on behalf of the defendants, a director of the defendants, one Lam Tsen Fui ('Lam'), deposed to two matters in answer to the plaintiffs' application to obtain possession of the mortgaged properties and for payment of the outstanding sum.

The first matter is that sometime in August/September 1988 the plaintiffs' manager, one Kwan Cheng Kee ('Kwan'), had persistently tried to persuade and induce Lam to purchase a piece of property from a friend of Kwan. Lam refused to do so. As a result the relationship between the plaintiffs and the defendants deteriorated. The second matter was that sometime after the receipt of the letter of demand of 29 March 1989, the defendants applied to another bank, the Asia Commercial Bank ('ACB'), for a loan of $2.8m, in order to enable the defendants to repay the outstanding loan to the plaintiffs. Lam was informed and believed that their application had been approved by ACB but that it was subsequently cancelled because the plaintiffs' manager, Kwan, in breach of the duty of banking secrecy and other duties owed by the plaintiffs to the defendants, disclosed to certain officers of ACB certain information concerning the defendants' overdraft account with the plaintiffs and also made certain unfounded allegations against the defendants.

In his affidavit in reply filed on 26 September 1989, Kwan deposed to the fact that the plaintiffs, on the instructions of its head office at Kuala Lumpur, decided to demand the repayment of the outstanding overdraft because the account had exceeded the limit of $1.8m. Many reminders were sent to the defendants to service the account by paying the accrued monthly interest and to bring down the account to the approved limit and the defendants were not able to comply with the same. Kwan denied the allegation relating to the matter involving Lam's refusal to buy a property from Kwan's friend. But I would observe that Kwan did not specifically respond to the allegation that he spoke to officers of ACB, resulting in ACB deciding not to approve the defendants' application for loan: there was only a general denial. Kwan did not say that he did not speak to the officers of ACB.

In a further affidavit filed on 12 October 1989, Lam averred that because the plaintiffs' and the defendants' relationship deteriorated in September 1988, the defendants decided to approach ACB to negotiate an alternative arrangement in order to repay the loan from the plaintiff. Lam further deposed to the following:

> 6 The defendants were informed by three senior officers of the ACB that the defendants' said application had been duly processed internally recommended and approved. However, sometime in April/May 1989, the defendants were informed by the ACB that the ACB had decided to reject the defendants' application in view of what Kwan Cheng Kee, the credit manager of the plaintiffs had wrongfully stated, divulged and disclosed to the ACB over the telephone.
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> 7 I wish to reiterate that the defendants intend to subpoena the officers of ACB at the trial of this action to disclose to this honourable court the contents of the telephone conversation made by the plaintiffs' said Mr Kwan Chen Kee with the ACB and to produce the internal memorandum of the ACB to substantiate the facts deposed to above.

No reply was made by Kwan to these specific allegations.

On the hearing of the appeal before me much the same arguments were raised as were before the senior assistant registrar: fraud, illegality, breach of statutory duty (s 457 of the Banking Act (Cap 19, 1985 Ed)) and unconscionable conduct. These arguments were based on the two main events deposed in the affidavits of Lam — (i) Kwan was upset when Lam refused to purchase a property from Kwan's friend; (ii) the telephone conversations which Kwan had with officers of ACB wherein Kwan made disclosures forbidden by law and in breach of confidentiality. While I did not think there was anything very much in relation to the event in (i), it seemed to me that there was certainly something to be investigated in relation to (ii). Counsel for the defendants explained to me that he could not obtain an affidavit from the officers of ACB deposing to those facts set out by Lam because, apart from s 47 of the Banking Act, in practice no bank officer would disclose anything unless ordered or subpoenaed by the court. They proposed to subpoena the ACB officers to testify at the trial.

The plaintiffs contended that the defendants had no defence; neither was there any issue to be tried. Counsel for the plaintiffs submitted that notwithstanding the two allegations involving Kwan, the plaintiffs were entitled to their claim. Counsel said that a claim by the defendants for unliquidated damages for alleged breach of confidence and/or breach of contract is not a defence to the plaintiffs' claim as a secured creditor to enforce the plaintiffs' security. He relied in particular on *Samuel Keller (Holdings) Pte & Anor* v *Martins Bank*[1] and *Mobil Oil Co Ltd* v *Rawlinson*[2] for the proposition that, unless otherwise provided, a legal mortgagee had an unqualified right to possession of the mortgaged property. But in none of these two cases were allegations of fraud, illegality or unconscionable conduct in issue. The courts there held that the existence of a counterclaim was no ground to refuse to grant possession to the mortgagee.

I was very much troubled by the fact that if the allegations made by Lam concerning Kwan and the ACB officers were true, it effectively meant that it was by an act of the plaintiffs which disabled the defendants to repay the loan of the plaintiffs and have the mortgage discharged. It did not seem unreasonable to say that there could be implied in the mortgage a term that the plaintiffs' right to possession of the property was subject to the qualification that it could not be exercised if there was fraud or unconscionable conduct. It also seemed most extraordinary that the court should have no discretion at all to refuse the grant of the relief of possession or postpone the grant of such relief where fraud or unconscionable conduct was alleged.

In *Birmingham Citizens' Permanent Building Society* v *Caunt*,[3] Russell J recognized that there was an exception to the rule that a mortgagee was entitled to possession which he stated to be as follows:

> To this the sole exception is that the application may be adjourned for a short time to afford to the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him ...

In *Royal Trust Co of Canada* v *Markham*[4] at p 436, Sir John Pennycuick, delivering the first judgment in the Court of Appeal, held that 'a characteristic instance in which that sole exception is applicable is where the mortgagor has entered *or is about to enter into a contract* for the sale of the property at a price which will enable the mortgage to be paid off in full'.

Further, *Fisher & Lightwood's Law of Mortgage* (10th Ed) states the following at p 332:

> However, an order for possession might not be made if there were a substantial question as to the validity or right to enforcement of the mortgage, or if the right to possession were being exercised improperly.

and at p 333:

> Where the right of entry is to arise only on default on payment on demand, a reasonable time must be given to the mortgagor to comply with the demand before the right is exercised.

It seems to me implicit that if this opportunity of paying off the mortgagee is to have any real meaning, there must be an obligation on the part of the mortgagee not to do anything during that period which would delay, undermine or frustrate the mortgagor's efforts to obtain alternative financing in order to pay off the mortgagee and have the mortgage discharged.

In this regard it may be pertinent to refer to the case *Quennell* v *Maltby*[5] where equity stepped in to mitigate the rigour of the law. I agree that the facts in *Quennell*[5] were quite different and, as appear from the headnote, are as follows. There the owner of a house mortgaged it to his bank to secure a relatively small overdraft of £2,500. The mortgage contained a covenant that the owner was not to let the house without the bank's consent. In breach thereof the owner let the house to a tenant who became a statutory tenant protected by the Rent Acts. The owner, wishing to regain vacant possession of the property in order to sell it, asked the bank to bring an action against the tenant for possession since the tenancy, being made in breach of the covenant, was not binding on the bank. The bank declined that request, as their position as mortgagee was not in jeopardy. The owner's wife then paid off the amount owing to the bank and the mortgage was transferred into her name. She brought an action for possession against the tenant contending that she stood in the bank's shoes and, like the bank, was not bound by the tenancy. The judge upheld her claim. However, on appeal, the Court of Appeal thought otherwise and held that possession would not be granted to the wife as the action was not to enforce the security but to get possession of the houseand to overcome the protection of the Rent Acts. Lord Denning MR said (at p 571):

> So here in modern times equity can step in so as to prevent a mortgagee, or a transferee from him, from getting possession of a house contrary to the justice of the case. A mortgagee will be restrained from getting possession except when it is sought bona fide and reasonably for the purpose of enforcing the security and then only subject to such conditions as the court thinks fit to impose.

Reverting to the facts of the present case, assuming that what the defendants said were true, the defendants were at the verge of obtaining alternative financing from another bank to pay off the plaintiffs and discharge the mortgage but for the totally unwarranted intervention of the plaintiffs' officer which led to that arrangement being aborted. I felt that if the allegations of breach of confidence/statutory duty were proven, it would clearly be inequitable (whether based on implied term as mentioned above, or equity generally) for possession to be granted to the plaintiffs to enable them to sell the same. In such an event it would not be unjustifiable to grant a reasonable period of time to enable the defendants to make alternative arrangement to pay off the plaintiffs and to discharge the mortgage. In the circumstances here equity should step in to mitigate the rigour of the law. In the meantime the facts relating to the allegation must be investigated first as that is the central point. Thus I confirm the order of the senior assistant registrar that the case should go for trial though I also saw fit to order an early trial.

Before me counsel for the plaintiffs also raised a technical point of evidence which was not raised before the senior assistant registrar and it was that the allegations deposed to by Lam involving Kwan and the ACB officers were hearsay. He said this was not a case where O 41 r 5(2) of the RSC applies. Under r 5(1), subject to certain exceptions, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove. Rule 5(2) provides that an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

In his submission, counsel for the plaintiffs argued that this application was for a final order and was not for an interlocutory order. In *Rossage* v *Rossage*[6] the Court of Appeal cited with approval the views expressed by Cotton LJ in *Gilbert* v *Endean*,[7] that 'for the purpose of this rule, those applications only are considered interlocutory which do not decide the rights of the parties'. Equally pertinent is the case *Nationwide Building Society* v *Bateman*[8] where Goulding J held that an application for possession by a mortgagee was not an interlocutory proceeding. I agreed that the present application by the plaintiffs is not an interlocutory matter but an application to determine the rights of the parties.

Further, even assuming that r 5(2) applies to this application there is a defect in the affidavits affirmed by Lam: he failed to identify the specific officers in ACB

from whom he had obtained the information. So, strictly, this portion of the evidence should be disregarded.

Having stated the foregoing, I must point out that nowhere in the affidavits of the plaintiffs was this objection raised. Neither was it raised in arguments before the senior assistant registrar who first heard the application and on whose decision the appeal had come before me. In my view, the plaintiffs must be taken to have waived the requirement of strict proof. I think I am fortified in so holding by the following passage in the judgment of Cotton LJ in *Gilbert* v *Endean*[7] where he said (at p 268):

> In my opinion, therefore, on such applications, if an affidavit on information and belief is made, the other side is not called upon to answer it under the peril of its being said to him, 'You have in fact admitted this by not denying it, and therefore the court may act upon the admission'. But I must add this: where in the court below the evidence not being strictly admissible, not being that upon which the court can properly act, if the person against whom it is read does not object, but treats it as admissible, then before the Court of Appeal, in my judgment, he is not at liberty to complain of the order on the ground that the evidence was not admissible. But in such a case the court does not act on the statement as being evidence properly admissible, but because the party has by the course which he adopted waived proof of the facts stated on information and belief.

This statement of the law was also cited with approval in *Rossage* v *Rossage*.[6]

Appeal dismissed.

Solicitors: *Tan Lee & Partners*; *Lee & Lee*.

Reported by *Terence Tan Bian Chye*

Invar Realty Pte Ltd v Kenzo Tange Urtec Inc & Anor

HIGH COURT (SINGAPORE) — SUIT NOS 983 AND 3223 OF 1987
YONG PUNG HOW J
5 SEPTEMBER 1990

Civil Procedure — Counterclaim — Defendants counterclaiming in respect of professional fees — Claim admitted by plaintiffs — Whether defendants entitled to summary judgment — Rules of the Supreme Court 1970, O 14

Civil Procedure — Pleadings — Amendment of defence to counterclaim — Summary judgment entered on counterclaim — Whether plaintiff entitled to amend defence after final judgment — Rules of the Supreme Court 1970, O 20 r 5

The plaintiffs were the developers of a building. The first defendants were the architects and were appointed by the plaintiffs as the principal consultants for the building project. The second defendants were the civil and structural engineers appointed by the first defendants for the building project. The design of the building provided for two special features. One of these features caused problems which led to delay and remedial works. The plaintiffs brought actions for breach of contract and/or negligence against both defendants which were later consolidated. The second defendants made a counterclaim against the plaintiffs for the balance of professional fees due to them. The plaintiffs in their defence to the counterclaim admitted that such fees were due to the second defendants but that the amount owing was, according to their calculations, $116,585.07, instead of $179,250 as claimed by the second defendants. The plaintiffs also contended that they were entitled to set off against the counterclaim of $116,585.07 so much of their own claim against the second defendants as would satisfy and extinguish the counterclaim.

The second defendants applied under O 14 r 5 for summary judgment for $116,585.07 and obtained judgment from the registrar for this amount, with a stay of execution pending trial of the plaintiffs' claim, and with leave to the plaintiffs to defend the balance of the counterclaim. The plaintiffs appealed against this to the judge-in-chambers. The plaintiffs also applied to amend their defence to the counterclaim, to make it clear that the $116,585.07 would have been payable but for the second defendants' breach of contract and/or negligence. This application was resisted on the ground that that the plaintiffs had made an admission on which judgment could be founded, and that such an amendment could not be made after what was a final judgment had already been entered.

Held, dismissing the plaintiffs' appeals:

(1) If there is no defence to a claim other than a plausible counterclaim, then judgment must be entered on the claim. The overriding consideration is that if the claim is undisputed other than by means of a counterclaim, the claimant must not be put to the expense of proving his claim, even if no great expense would be incurred. The plaintiffs had by their pleadings admitted in the clearest terms that the second defendants' fees were owed to them, computing this to the very last cent. In the circumstances, the second defendants are entitled to judgment with a stay of execution.

(2) While the court had a very wide power of amendment even after judgment, the appropriate cases in which such a power should be exercised must necessarily be very limited. Whether or